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K&L Gates LLP
P.O. Box 1135
CHICAGO, IL 60690

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PADEN, CAROLYN A	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CARL ERIK HANSEN,
CHRISTOPHER BUDWIG,
SUNIL KOCHHAR,
MARCEL ALEXANDRE JUILLERAT,
JEAN-CLAUDE SPADONE,
PIERRE NICOLAS, ROBERT REDGWELL,
EUAN ARMSTRONG, and
DIETMAR SIEVERT

Appeal 2009-2307
Application 10/824,376
Technology Center 1700

Decided:[1] May 29, 2009

Before BRADLEY R. GARRIS, JEFFREY T. SMITH, and
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

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[1] The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

DECISION ON APPEAL

Statement of the Case

This is an appeal under 35 U.S.C. § 134 from a final rejection of claims 1-20.[2] We have jurisdiction under 35 U.S.C. § 6.[3]

Appellants' invention relates to a process for manipulating the flavor of a single mass of chocolate by adding a flavor effective amount of a non-cocoa and/or milk/dairy flavor attribute and a chocolate product containing a flavor effective amount of a non-cocoa/dairy flavor attribute. Claims 1 and 15 are illustrative:

> 1. A process for manipulating the flavor of a single mass of chocolate which comprises utilizing a conventional process for manufacturing the chocolate; and adding a flavor effective amount of a non-cocoa/dairy flavor attribute to the chocolate mass thus manipulating its flavor.
>
> 15. A chocolate product containing a flavor effective amount of a non-cocoa/dairy flavor to provide roasted, sweet, bitter, crumb, caramel, fruity, floral, biscuit, baked, bready, popcorn, cereal, malty, astringent or praline attributes.

The following rejection is presented for our review:

Claims 1-5 and 11-20 stand rejected under 35 U.S.C. § 103(a) as obvious over the combined teachings of Ripper, UK Patent Application

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[2] An oral hearing was held for this appeal on April 7, 2009.
[3] In rendering this decision, we have considered the Appellants' arguments presented in the Appeal Brief dated January 26, 2008 and the Reply Brief dated June 4, 2008.

No. GB 2033721A, published May 29, 1980, and Rusoff, U.S. Patent No. 2,835,890, issued May 20, 1958.

Claims 1-4, 6, and 10-20 stand rejected under 35 U.S.C. § 103(a) as obvious over the combined teachings of Ripper and Kleinert, U.S. Patent No. 3,769,030, issued October 30, 1973, or Watterson, U.S. Patent No. 5,676,993, issued October 14, 1997.

Claim 7 stands rejected under 35 U.S.C. § 103(a) as obvious over the combined teachings of Ripper, Rusoff, and Eggen, U.S. Patent No. 4,343,818, issued August 10, 1982.

Claims 8 and 9 stand rejected under 35 U.S.C. § 103(a) as obvious over the combined teachings of Ripper, Rusoff, and Hansen, U.S. Patent No. 5,888,562, issued March 30, 1999.

ISSUE

Appellants contend that the Examiner has not established a prima facie case of obviousness because the combinations of the cited references do not teach every element of the claimed invention. Appellants contend that the combination of Ripper and Rusoff teach away from traditional or conventional methods of manufacturing chocolate as required by the claims. (App. Br. 13-15). Likewise, Appellants contend that the combination of Ripper, Kleinert, and/or Watterson teach away from traditional or conventional methods of manufacturing chocolate. (App. Br. 16-20).

For each of the stated rejections the issues presented are: Have Appellants shown reversible error in the Examiner's conclusion that it would have been obvious to a person of ordinary skill in the art to (1) form a chocolate product containing a flavor effective amount of a non-cocoa/dairy flavor attribute as required by claim 15; and (2) to perform a process for manipulating the flavor of a single mass of chocolate utilizing a conventional process for manufacturing the chocolate and adding a flavor effective amount of a non-cocoa/dairy flavor attribute to the chocolate mass thus manipulating its flavor as required by independent claims 1, 11-14, 16, 18, and 20.

We have thoroughly reviewed each of Appellants' arguments for patentability. However, we are in complete agreement with the Examiner that the claimed subject matter is not patentable within the meaning of § 103 in view of the applied prior art. Accordingly, we will sustain the Examiner's rejections.

FINDINGS OF FACT

The Specification discloses that processes of producing chocolate are known and described in the "Industrial Chocolate Manufacture and Use," edited by S. T. Beckett, (Third Edition, 1999, Blackwell Science). (Spec. 1).

The Specification discloses "that there are a large number of different consumer-recognizable flavor attributes associated with chocolate .. . . These flavor attributes may be, for example, roasted, sweet, bitter, crumb, caramel, fruity, floral, biscuit, bouquet, spicy, scented, baked,

bready, cereal, popcorn, malty, astringent and praline. Such flavor attributes are well-known in the cocoa trade where they form part of the vocabulary. Consequently, local chocolates are often unique and contain flavor attributes that are important for the consumer." (Spec. 2).

The Examiner finds that Ripper describes another known technique for producing chocolate. The Examiner also finds that the chocolate of Ripper has a sweet flavor attribute because of the amount of sugar present. (Ans. 4-5; Ripper, pages 1-2). The Examiner finds that Rusoff describes the formation of flavor attributes that are suitable for use with chocolate. (Ans. 5). The Examiner finds that Kleinert and Watterson describe the formation of flavor attributes utilizing the Maillard reaction that are suitable for use with chocolate. (Ans. 6-7).

Based on the findings reproduced here and those in the Answer, the Examiner concluded that it would have been obvious for a person with ordinary skill in the art to perform a process for manipulating the flavor of a single mass of chocolate utilizing a conventional process for manufacturing the chocolate and adding a flavor effective amount of a non-cocoa/dairy flavor attribute to the chocolate mass thus manipulating its flavor as required by independent claims 1, 11-14, 16, 18, and 20 and creating the chocolate product of independent claim 15.

PRINCIPLES OF LAW

In assessing whether a claim to a combination of prior art elements is obvious, the question to be asked is whether the improvement of the claim is more than the predictable use of prior art elements according to

their established functions. *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 417 (2007). The analysis need not seek out precise teachings directed to the specific subject matter of the claim, for it is proper to take account of the inferences and creative steps that a person of ordinary skill in the art would employ. *Id.* at 418.

Where the rejection is based on a combination of references, the test for obviousness is what the combined teachings of the references would have suggested to those of ordinary skill in the art. *In re Keller,* 642 F.2d 413, 425 (CCPA 1981).

ANALYSIS

Appellants contend that the cited prior art teaches away from traditional or conventional methods of manufacturing chocolate as required by the claims. However, as set forth above, conventional techniques for producing chocolate are known by persons of ordinary skill in the art. Also known to persons of ordinary skill in the art are techniques for adding flavor attributes to chocolate. Having acknowledged that certain claimed elements are taught by the prior art, Appellants cannot now defeat an obviousness rejection by asserting that the cited references fail to teach or suggest these elements. *See Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1570 (Fed. Cir. 1988) ("A statement in a patent that something is in the prior art is binding on the applicant and patentee for determinations of anticipation and obviousness."); *In re Nomiya*, 509 F.2d 566, 571 n.5 (CCPA 1975) (It is a "basic proposition that a statement by an applicant, whether in the application or in other papers submitted during prosecution, that certain matter is 'prior art' to him, is an admission that

that matter is prior art for all purposes . . ."). As such, Appellants arguments regarding the disclosure of traditional or conventional techniques of manufacturing chocolate and the addition of flavor attributes thereto are of no patentable moment. [4]

Appellants have not asserted that the combination of elements of the claimed invention produces more than predictable use of prior art elements according to their established functions. *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. at 417. Appellants have not relied on evidence of unexpected results to rebut the Examiner's rejections.

Conclusions of Law

For the above stated reasons, Appellants have failed to show reversible error in the Examiner's conclusion that it would have been obvious to a person of ordinary skill in the art to (1) form a chocolate product containing a flavor effective amount of a non-cocoa/dairy flavor attribute as required by claim 15; and (2) to perform a process for manipulating the flavor of a single mass of chocolate utilizing a conventional process for manufacturing the chocolate and adding a flavor effective amount of a non-cocoa/dairy flavor attribute to the chocolate mass thus manipulating its flavor as required by independent claims 1, 11-14, 16, 18, and 20.

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[4] The Examiner cited the Eggen and Hansen references for describing various flavor attributes. (Ans. 7-9). Appellants have not asserted that these references do not describe the flavor attributes as asserted by the Examiner. Rather, Appellants contend that these references do not cure the deficiencies of Ripper, Rusoff, and Hansen. (App. Br. 20-22).

ORDER

The decision of the Examiner rejecting claims 1-20 under 35 U.S.C. § 103(a), is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(v).

AFFIRMED

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K&L GATES, LLP
P. O. BOX 1135
CHICAGO, IL 60690